No. 77-396

In the Supreme Court of the United States

OCTOBER TERM, 1977

VINCENT PACELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. B). The opinion of the district court (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1977. A petition for rehearing was denied on June 15, 1977 (Pet. App. C). The petition for a writ of certiorari was filed on September 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in denying petitioner's motion to vacate his sentence under 28 U.S.C. 2255 without an evidentiary hearing.

STATEMENT

On June 22, 1965, following a seven-week jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to violate the federal narcotics laws, 21 U.S.C. (1964 ed.) 173, 174. He was sentenced to 18 years' imprisonment and fined $20,000. The judgment of conviction was affirmed. *United States* v. *Armone*, 363 F. 2d 385 (C.A. 2), certiorari denied, 385 U.S. 957.[1] Briefly, the evidence at trial showed that petitioner had conspired with others from 1956 through 1960 to import and distribute large quantities of heroin in the United States. The drugs were smuggled into this country from France with the aid of business and diplomatic couriers and eventually were sold to petitioner, who acted as a domestic wholesaler.

At trial, the government's chief witness was co-conspirator Charles Hedges. Hedges had previously been convicted of narcotics violations in a 1961 jury trial. In the course of that trial Hedges had testified in his own defense and, as he later admitted during his testimony in *Armone*, had committed perjury. Hedges was sentenced to 15 years' imprisonment. His conviction was affirmed on appeal, although those of his co-defendants were reversed. *United States* v. *Cianchetti*, 315 F. 2d 584 (C.A. 2). Shortly thereafter, at the suggestion of the district court, Hedges moved for a reduction of his sentence under Rule 35, Fed. R. Crim. P., and his sentence was reduced to five years' imprisonment.

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[1]Several co-defendants were fugitives at the time of the *Armone* trial. They were apprehended some five years later and were tried and convicted in 1969. The convictions were affirmed. *United States* v. *Guanti*, 421 F. 2d 792 (C.A. 2), certiorari denied, 400 U.S. 832.

In March 1966, petitioner was again convicted of federal criminal offenses in the Southern District of New York, this time of conspiracy to obstruct justice and suborn perjury, in violation of 18 U.S.C. 371, 1503, and 1622, and obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to two years' imprisonment on both counts, the terms to run concurrently with each other but consecutively to the sentence imposed on him in the *Armone* case. Petitioner's conviction was affirmed. *United States* v. *Kahn*, 366 F. 2d 259 (C.A. 2), certiorari denied, 385 U.S. 948. The evidence at this trial established that petitioner and two co-defendants joined in an unsuccessful effort to prevent Hedges from testifying against petitioner at the *Armone* trial. Hedges was also a key witness against petitioner at the *Kahn* trial.

On July 24, 1975, petitioner moved pursuant to 28 U.S.C. 2255 to vacate his narcotics conspiracy sentence, alleging that the government had suppressed evidence and had knowingly used perjured testimony in obtaining his conviction. The district court denied the motion (Pet. App. A), and the court of appeals affirmed (Pet. App. B).

ARGUMENT

Petitioner contends that the district court erred in denying his motion to vacate sentence without holding an evidentiary hearing. Both courts below properly concluded, however, that "the files and records of the case conclusively show[ed] that [petitioner was] entitled to no relief" (28 U.S.C. 2255) and that a hearing was therefore not required. See *Fontaine* v. *United States*, 411 U.S. 213, 215; *Machibroda* v. *United States*, 368 U.S. 487, 494. This finding does not warrant further review.

1. Petitioner claims that Charles Hedges perjured himself at petitioner's trial when asked whether he was receiving any consideration from the government in

return for his testimony and that Hedges and Agent Thomas Dugan of the Bureau of Narcotics lied under questioning about the circumstances surrounding a reduction of Hedges' 15 year prison sentence in the *Cianchetti* case. In support of his contention that he was entitled to an evidentiary hearing on these claims, petitioner relies essentially upon the testimony of Hedges, Agent Dugan and others at various court proceedings held a decade ago. His claims are insubstantial.

Hedges testified at petitioner's narcotics trial that he "expected to get nothing" from the government for his testimony and was "offered nothing, promised nothing, and * * * [had] asked for nothing" (*Armone* Tr. 972, 1070). To demonstrate that these statements were false, petitioner points principally to the testimony of James Godwin, Hedges' cousin, given some five years later in the *Guanti* trial (64 CR 828 (S.D.N.Y.)). Godwin testified at that trial that Hedges had received $3,000 from the government and that Hedges had said that government agents would have his *Cianchetti* sentence reduced from 15 to five years and would give him "anything" if he testified in the *Armone* trial (*Guanti* Tr. 917-920). Godwin did not identify any of the agents by name or personally hear any of the alleged promises about which Hedges purportedly had told him.

The district court properly concluded that Godwin's uncorroborated hearsay allegations in the *Guanti* trial were entitled to little weight. They had been presented in an effort to impeach Hedges, a key government witness, and thus to "ruin" the government's case (*Guanti* Tr. 485, 488). That they had little if any impact on the jury is clear from the fact that all defendants in *Guanti* were found guilty. Moreover, the court had an additional reason to view Godwin's allegations with circumspection inasmuch as petitioner had waited six years after Godwin's

testimony in the *Guanti* trial to seek relief on the grounds of alleged perjury by Hedges and Agent Dugan. See *Bishop* v. *United States*, 223 F. 2d 582, 586 (C.A. D.C.), vacated and remanded on other grounds, 350 U.S. 961.

Similarly unsubstantiated is petitioner's claim that Hedges and Agent Dugan lied about Hedges' sentence reduction. A review of the *Kahn* record makes clear that the reduction was a result of the district court's initiative, founded upon its concern that Hedges' sentence in *Cianchetti* was unfair in view of the reversal of his co-defendants' convictions (*Kahn* Tr. 1410-1413). The court mentioned the possibility of a sentence reduction to Agent Dugan, who responded that the government would have no objection. Hence, Agent Dugan's testimony in *Armone* that he did not tell Hedges to make an application for reduction of sentence (*Armone* Tr. 3333-3334), and Hedges' testimony that he did not recall discussing his sentence reduction with Agent Dugan (*Armone* Tr. 1070), are not inconsistent with the sentencing judge's recollection that he "asked Mr. Dugan to communicate with Hedges' attorney * * * or with Hedges himself" (*Kahn* Tr. 1413). Finally, there is no inconsistency between Hedges' trial testimony in *Armone* and his relationship with Agent Dugan as an informant.

2. In the face of moving papers that contained no more than hearsay, conclusory allegations, and speculation, the district court correctly concluded that an evidentiary hearing was not required. *Blackledge* v. *Allison*, 431 U.S. 63, 75; *United States* v. *Romano*, 516 F. 2d 768, 771 (C.A. 2).[2] Petitioner's assertions were insufficient to state a valid

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[2] *Fontaine* v. *United States*, 411 U.S. 213, *Machibroda* v. *United States*, 368 U.S. 487, and *Blackledge* v. *Allison*, *supra*, upon which petitioner relies (Pet. 9), each involved detailed factual allegations, not rebutted by the record, that a guilty plea had been unconstitutionally induced—allegations that could only be resolved

claim under Section 2255 because there was no credible proof that Hedges' testimony was false or, if false, was known to be so by the government. Furthermore, even if Hedges did in fact lie about the matters now raised by petitioner, "there is [no] reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103. See also *United States* v. *Stofsky*, 527 F. 2d 237, 246-247 (C.A. 2), certiorari denied, 429 U.S. 819. Petitioner does not claim that any of the allegedly false testimony related to details of his involvement in the narcotics conspiracy of which he was found guilty. Rather, all of petitioner's allegations concern answers given to questions designed solely to impeach Hedges' credibility. But during a cross-examination in *Armone* that covered more than five days, Hedges testified about having committed perjury at his own trial, his extensive criminal background, and his cooperation with the government. Evidence serving to undermine his credibility even further would have been of minimal value to the defense. See *United States* v. *Rosner*, 516 F. 2d 269, 278-279 (C.A. 2), certiorari denied, 427 U.S. 911.[3]

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after an evidentiary hearing and that, if correct, would unquestionably have entitled the defendant to relief under Section 2255. By contrast, an evidentiary hearing was unnecessary here because the record contained an adequate basis for the district court to determine whether petitioner's allegations were accurate and, if so, whether they would warrant collateral relief from his conviction.

[3]There is nothing to petitioner's contention (Pet. 10-11) that the suggestion in *Blackledge* v. *Allison*, *supra*, 431 U.S. at 80-82, of a less than full evidentiary hearing should have been implemented in this case. Petitioner was afforded ample opportunity by the district court to present affidavits and other materials to "test whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of evidence." *Blackledge* v. *Allison*, *supra*, 431 U.S. at 80.

In sum, the district judge below, who also presided over petitioner's *Armone* trial, enjoyed the best possible position to assess the likely impact on petitioner's trial of the claimed perjury, since he "had the advantage of intimate familiarity with the case, born of many pre- and post-trial motions and a long trial where he had the opportunity to observe the witnesses." *United States* v. *Franzese*, 525 F. 2d 27, 32 (C.A. 2) (footnote omitted), certiorari denied *sub nom. Potere* v. *United States*, 424 U.S. 921. In these circumstances, the district court did not abuse its discretion in determining that petitioner's motion to vacate sentence—filed ten years after trial and long after all the evidence relied on by petitioner was a matter of public record—could be disposed of without the necessity of an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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